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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 443

RUFUS F. TURNER AND MARGUERITE H. TURNER,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner R. F. Turner was engaged as a sole proprietor in the fresh produce wholesale grocery business. He caused a corporation to be organized to which were transferred on January 1, 1957, assets of the sole proprietorship, its good will and all of the liabilities of the business (Pet. App. 2–3). In exchange, petitioner received all the shares of the common stock of the new corporation (of which he was the president) and some time between January and November 1957 a "Notice of Indebtedness" which provided (Pet. App. 7–8):

664027—62

NOTICE OF INDEBTEDNESS

JANUARY 1, 1957.

For value received, We, Cash Produce Co., Inc., do hereby promise to pay to Mr. Rufus F. Turner, his heirs or assigns, the amount of Forty-eight thousand, eight hundred, ninety-three dollars and forty-six cents ($48,893.46) without interest, payable at the office of the corporation on or after February 1, 1958; also the corporation is not to furnish security of any type for this indebtedness. It is also agreed that the payee may draw funds from the corporation at any time upon the pledge of this note as security, said drawings to be deducted from the amount of this liability prior to settlement.

Accepted and agreed to the above this date January 1, 1957.

(S) RUFUS F. TURNER,
Payee.

Cash Produce Co., Inc.,
(S) RUFUS F. TURNER,
Registered Agent,
President.

Thereafter, in January 1958 the corporation issued to petitioner a long term debenture bond in the same amount in exchange for the Notice of Indebtedness. This transaction occurred a few day after petitioner had been advised by an accountant that the "Notice of Indebtedness" rendered the transfers to the corporation taxable rather than tax-free (Pet. App. 11).

Section 351(a) of the Internal Revenue Code of 1954 provides that "No gain or loss shall be recog-

nized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation and immediately after the exchange such person or persons are in control * * * of the corporation." Section 351(b) in turn provides that where "other property" is receive in addition to stock or securities, the gain if any, to the recipient shall be recognized to the extent of the fair market value of the other property. The question presented here is whether both courts below properly sustained the Commissioner's determination that the Notice of Indebtedness was not a "security" but was "other property" within the meaning of Section 351 which was taxable to petitioner at its fair market value.

Petitioner contends that the Notice of Indebtedness was a "security" within the meaning of Section 351 (Pet. 10–17). He argues further that even if the Notice was properly found to be "other property" rather than such a security, it was but an intermediate step in a single preconceived plan looking toward issuance of the long term debenture and should, therefore, have been held tax-free (Pet. 18–19).[1] These contentions were properly rejected by both courts below. There is no conflict with the decisions of other courts, and the petition presents no question warranting review.

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[1] Respondent has conceded that the long-term debenture issued in January 1958 is a "security" which, if issued under the circumstances outlined in Section 351, would be received tax free (Pet. 19).

There can be no question that the Notice of Indebtedness, which afforded petitioner an immediate right to "draw funds from the corporation * * * said drawings to be deducted from the amount of this liability prior to settlement," was not a security entitled to be received tax-free under Section 351(a). *Pinellas Ice Co. v. Commissioner,* 287 U.S. 462. Nor was the Notice an intermediate step in a preconceived plan looking toward issuance of such a security. The terms of the Notice were unconditional and gave petitioner an immediate right to withdraw from the corporation cash equivalent to its face value. At most, any plan was for petitioner to retain an option, exercisable at his will, to exchange the Notice for some other form of indebtedness.[2] The fact that he later chose to make the exchange—after receipt of further tax advice—does not render the issuance of the Notice a part of a preconceived plan and thereby avoid the tax consequences which attached upon its issuance.[3]

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[2] The existence of any such plan, however, would have been in direct conflict with the express terms of the Notice of Indebtedness which provided that "the corporation is not to furnish security of any type for this indebtedness" (*supra*, p. 2).

[3] There is no merit to petitioner's alternative argument (Pet. 19–22, 24–25) that the Notice of Indebtedness had no fair market value. The contention rests on the claim, rejected by both courts below, that the good will transferred by petitioner to the corporation and shown on its books with value of $74,300, was actually valueless. As the court of appeals stated in affirming the Tax Court's finding that the good will had a fair market value equivalent to the value assigned to it on the books, "The contemporaneous conduct and declarations of [petitioners'] accountant as the man most familiar with taxpayers' business are certainly substantial evidence to support the court's findings" (Pet. App. 31–32). There is no cause for this Court to make a further review of this factual determination.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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